No. 93-1214

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

STEVEN P. BOUREXIS,

Petitioner,

v.

CARROLL COUNTY, MARYLAND,
NARCOTICS TASK FORCE, et al.

Respondents.

On Petition For
Writ of Certiorari to the
Court of Special Appeals of Maryland

BRIEF OF OFFICER ANDREW McKENDRICK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 24, 1994

QUESTIONS PRESENTED

1. Whether police officers, acting as members of a narcotics task force consisting of prosecutors and police officers from several jurisdictions, by declining to engage in plea negotiations with criminal suspects who are represented by a particular attorney, violate the constitutional rights of that attorney to due process, equal protection, or free speech.

2. Whether an appellate court, in affirming the judgment of the court below dismissing appellant's suit for failure to state a claim upon which relief may be granted, has violated the due process rights of appellant in reaching its judgment by considering, inter alia, evidence submitted in the record below by appellant.

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STATUTORY PROVISIONS

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §12-201 6

Except as provided in §12-202 of this title, in any case or proceeding pending in or

decided by the Court of Special Appeals upon appeal fom a circuit court or an orphans' court or the Maryland Tax Court, any party, incuding the State, may file in the Court of Appeals a petition for certiorari to review the case or proceeding. The petition may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than the time prescribed by the Maryland Rules. In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion.

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §12-203 7

If the Court of Appeals finds that review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

STATEMENT OF THE CASE

The Carroll County Narcotics Task Force ("the Task Force") is an inter-governmental task force including prosecutors, Maryland State Police troopers and members of the Westminster, Maryland, Police Department whose purpose is the County-wide investigation and prosecution of drug and drug-related crimes. Respondent Andrew McKendrick ("Officer McKendrick") is a member of the Westminster Police Department assigned to the Task Force.

Petitioner Steven Bourexis ("Bourexis") is an attorney in Carroll County. His practice includes the representation of suspects accused of drug and drug-related crimes. Bourexis filed a complaint for injunctive relief and damages in the Circuit Court for Carroll County against the Task Force, Officer McKendrick and Maryland State Trooper

Robert Heuisler, another member of the Task Force. Bourexis alleged that the Task Force and the individually named defendants, as a matter of policy and practice, refused to "work with" suspects represented by him, thereby depriving him of his property interest in his livelihood, violating his constitutional rights to equal protection and freedom of speech, and tortiously interfering with his business relations. Contemporaneously with the filing of his complaint, Bourexis moved for an interlocutory injunction preventing the Task Force from continuing this practice.

All defendants filed motions to dismiss or in the alternative for summary judgment. In his motion, Officer McKendrick argued, inter alia, that Bourexis failed to state a claim against him because (1) Bourexis has no consti-

tutionally protected right or interest in plea bargaining on behalf of his clients, (2) Bourexis' clients have no constitutionally protected right or interest in negotiating plea agreements, and (3) even if his clients had some constitutionally protected interest in negotiating a plea bargain, Bourexis could not bring their constitutional claims derivatively. Officer McKendrick also argued that he is entitled to both absolute prosecutorial and qualified official immunity.

After a hearing on the motions, at which Bourexis testified and presented other evidence, the circuit court denied Bourexis' request for injunction, granted the respondents' dispositive motions and entered judgment in their favor, finding that Bourexis failed to state a claim and that respondents were immune from suit.

On appeal, the Court of Special Appeals of Maryland, the State's intermediate appellate court, affirmed the judgment. Bourexis v. Carroll County Narcotics Task Force, 96 Md. App. 459 (1993), reprinted at pages A. 2 through A. 31 of the Petition for Writ of Certiorari. In his appeal, Bourexis acknowledged that his complaint regarding the Task Force's "refusal to 'work with' his clients" reduced to "discrimination threatened or practiced ... in the context of excluding them from the opportunity to obtain the benefits derived from a plea agreement." Id. at A. 6.

The Court of Special Appeals observed that "the essence of [Bourexis'] grievance is that the defendants have interfered with his occupational opportunities by making him less desirable to have as a lawyer." Id. at A. 30. In the absence of

any allegation or evidence that the Task Force policy actually caused him to lose any client or prospective client, however, or compelled him to lower his fees in order to attract or maintain business, the Court of Special Appeals held that Bourexis had not stated a claim. The court concluded simply that Bourexis "has alleged conduct that may be wrongful to others but none that has wronged him." Id. at A. 31 (emphasis in original).

The Court of Special Appeals did not reach the issue of whether Bourexis, as attorney, has any constitutionally protected right or interest to negotiate plea bargains on behalf of his clients who are criminal suspects. Further, the court did not reach the issue of the prosecutorial or official immunity which the circuit court found to be a bar to Bourexis' claim.

Bourexis petitioned the Court of Appeals of Maryland for a writ of certiorari pursuant to Md. Code Ann., Cts. & Jud. Proc. Art., §12-201 (1974, 1989 Repl. Vol., 1993 Cum. Supp.), raising three questions. The first question was substantively identical to the first question presented in this Court. The second question was whether

> a criminal defense attorney [must] suffer actual loss of business before an injunction may issue restraining a law enforcement task force and its members from refusing to work with that attorney's clients solely because they are his clients or is the threat of imminent and irreparable harm to the attorney's practice sufficient.

The third question concerned the capacity of the Task Force to be sued. The petition for certiorari in the Court of Appeals did not raise the constitutional question of whether the Court of Special Appeals had violated Bourexis' right to

due process in its affirmance of the trial court's decision on the record.

The Court of Appeals denied the petition on October 28, 1993, finding that Bourexis had not shown that review by certiorari would be desirable and in the public interest, the standard required under Maryland law for the issuance of the writ. Md. Code Ann., Cts. & Jud. Proc. Art., §12-203.

In this Court, the Task Force and Officer Heuisler have filed a separate brief in opposition to Bourexis' petition for writ of certiorari. Officer McKendrick incorporates by reference the arguments set forth in their brief.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MERIT REVIEW BECAUSE BOUREXIS' ALLEGATION THAT THE TASK FORCE'S POLICY NOT TO ENGAGE IN PLEA NEGOTIATIONS WITH CRIMINAL SUSPECTS REPRESENTED BY HIM FAILED TO STATE A CLAIM FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Bourexis acknowledged before the Court of Special Appeals that his claims derive entirely from his allegation that the Task Force routinely advises criminal suspects that, if they retain him as their lawyer, the Task Force will not "work with" them. Although he did not define the phrase "work with" in his complaint in the circuit court, Bourexis testified at the hearing on his motion for interlocutory injunction that he understood the phrase to refer to cooperative efforts between the Task Force and suspected drug offenders. In "working with" the Task Force, the suspect might provide information or other cooperation to the Task

Force in exchange for favorable consideration from the prosecutor or judge, which may include dropping or reducing charges, stipulating to facts, agreeing not to allocute at sentencing, and mitigating punishment. In substance, "working with" the Task Force involves activities at the heart of the plea bargaining process. See Santobello v. New York, 404 U.S. 257, 260 (1971).

Bourexis conceded that "the only way in which the Defendants relate to [him] is through [his] clients." Thus, Bourexis' assertion of a constitutional right is wholly derivative of any right of his clients to engage in plea negotiation activities. Neither Bourexis nor his clients, however, have any constitutionally protected right to or interest in negotiating plea agreements.

Criminal suspects have no constitutionally protected right to compel negotiated dispositions of their cases. Weatherford v. Bursey, 429 U.S. 545, 561 (1977). The Court in Weatherford clearly stated that

> [t]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.

429 U.S. at 560-561. Certainly, the State's failure to adhere to a promise contained in a plea agreement may provide a defendant the right to attack his conviction or sentence. Santobello v. New York, 404 U.S. 257, 257 (1971). Such a right, however, arises only after "plea discussions are voluntarily entered into by authorized governmental agents; there is no constitutional right in defendants

to have the government 'bargain' in the first instance." Cooper v. United States, 594 F.2d 12, 19-20 (4th Cir. 1979).

Bourexis does not allege that the Task Force violated agreements or reneged on proposed deals where clients relied upon reasonably formed expectations. He claims simply that the Task Force refused in the first instance to "work with" his clients. This is not a cognizable claim because, as a matter of law, Bourexis' clients cannot compel the government to negotiate with them. Refusing to "work with" a suspect is the prerogative of the Task Force, and would not violate the constitutional right of the suspect. A fortiori, the refusal to "work with" clients of Bourexis does not violate any derivative right of Bourexis to participate in plea bargaining.

Moreover, Bourexis has no independent property right to practice his profession by compelling the criminal prosecutor to participate in plea negotiations with him. As the Court explained in Board of Regents v. Roth, 408 U.S. 564, 577 (1972),

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Although Bourexis acknowledges that property interests must stem from a source independent of the Constitution, he fails to point to any such source for the property interest he would assert. He first suggests that his "right" may stem from the state's recognition of the attorney-client privilege. Petition for Writ of Certiorari at 15. Of course, this

privilege cannot create any property right in the attorney because the privilege belongs to the client. See Harrison v. State, 276 Md. 122, 131-136 (1975).

He next states that his property right is "created under state statutes, rules of procedure, and common law," Petition for Writ of Certiorari at 16, and he points to the preamble to the Maryland Lawyers' Rules of Professional Conduct. The portion of the Preamble quoted by Bourexis, Petition for Writ of Certiorari at 16-17, expresses nothing more than the concept that authority over the legal profession, as declared in Rules of Professional Conduct, ought to be vested in the judicial system. It does not purport to create a property interest in a given attorney-client relationship, and certainly does not vest in the attorney the right to compel a prosecutor to nego-

tiate plea bargains with him on behalf of his clients.

Bourexis has no employment or other contractual relationship with the State and has not been deprived of any State benefit or other entitlement. No officer of the Task Force prevented him from representing any client who desired to be represented by him, and his entitlement to practice law was not limited in any way by the alleged refusal to "work with" his clients. His general property interest in his livelihood is not at all infringed by the policy of the Task Force not to plea bargain with certain criminal suspects. Thus, he has not been deprived of any property interest by the State.

Furthermore, even if Bourexis had some constitutional property right at stake, Bourexis failed to state a claim for infringement of his property right

because he failed to show that this right was infringed in any way. The Court of Special Appeals correctly found that Bourexis did not allege or show any harm flowing to him from the policy of the Task Force not to "work with" criminal suspects represented by Bourexis.

Bourexis lacks a constitutional right to participate in plea negotiations. That, coupled with the absence of legally redressable harm to him flowing from the discretionary refusal of the Task Force to participate in plea negotiations with him in his capacity as defense counsel, makes this case unworthy of the Court's attention.

II. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE COURT OF SPECIAL APPEALS DID NOT VIOLATE BOUREXIS' DUE PROCESS RIGHTS BY CONSIDERING EVIDENCE SUBMITTED BY HIM IN THE CIRCUIT COURT IN REACHING ITS DETERMINATION THAT HE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

At the threshold, the constitutional question of whether the Court of Special Appeals violated Bourexis' right to due process was not "timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." Rules of the Supreme Court of the United States, Rule 14(h). Bourexis states that "the asserted violation of due process that occurred when the appellate court affirmed on the ground that Petitioner had failed to show economic harm was not raised below, because the issue did not appear until issuance of the opinion of the Court of Special Appeals." Petition for Writ of

Certiorari at 10. Thus he implies that there was no forum, before this one, in which to raise the issue. He ignores, however, the fact that he filed a petition for a writ of certiorari with the Court of Appeals of Maryland. In his petition, Bourexis raised the issue of whether the Court of Special Appeals erred in determining that he must show economic harm, but he did not raise the issue of whether the action of the Court of Special Appeals violated his constitutional right to due process. See Saunders v. Shaw, 244 U.S. 317, 320 (1917) (where a state appellate court issued a "surprise" ruling which spawned the federal question, petitioner properly and timely raised the federal issue for the first time in a petition for rehearing in that court, meeting the jurisdictional requirement for Supreme Court review).

His failure to raise the constitutional issue at the appropriate time deprived the Court of Appeals of Maryland of the opportunity to decide the issue in the first instance. His failure to raise the question below is sufficient ground to deny the petition. See Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 n.6 (1968) (noting that, where a party failed to present the federal question to the state supreme court, the Supreme Court would decline to consider the issue); Beck v. Washington, 369 U.S. 541, 553 (1962) (holding that a litigant who failed to raise a federal issue in his "assignment of errors" in the state supreme court had waived the issue).

Turning to the substance of the issue, it is clear that the Court of Special Appeals did not violate Bourexis' right to due process in the manner here

claimed. Bourexis contends that his claim against respondents is a form of property, which the Court of Special Appeals "extinguished" without giving him a meaningful opportunity to be heard. Petition for Writ of Certiorari at 18-19. He asserts that the Court of Special Appeals decided the case against him "on a factual ground ... not reached by the trial court and not raised by the moving party." Petition for Writ of Certiorari at 18, argument heading 2. This argument, along with Bourexis' contention that he "never had an opportunity to demonstrate that economic injury flowed from the actions complained of", id. at 19 (emphasis in original), is disproved by the procedural history of the case.

First, Bourexis, in his memorandum in opposition to defendant McKendrick's motion to dismiss and in support of

plaintiff's motion for interlocutory injunction, argued, inter alia, that he suffered economic injury as a result of the policy of the Task Fcrce. In that memorandum he stated that "[t]he Defendant's conduct continues to irreparably harm the Defendant's [sic] reputation and his business which is, of course, the Defendant's intent." Excerpt from memorandum in opposition to defendant McKendrick's motion to dismiss and in support of plaintiff's motion for interlocutory injunction, at 7, reprinted herein as A. 1 to A. 3.

Second, there was a hearing on the motion for interlocutory injunction, at which Bourexis testified, called two witnesses, and presented other evidence. One of the prerequisites under Maryland law for issuance of an interlocutory injunction is that the movant will suffer

irreparable injury unless the injunction is granted. See Department of Transportation v. Armacost, 299 Md. 392, 404-405 (1984). Necessarily, that issue received considerable attention at the hearing on Bourexis' motion for interlocutory injunction. After considering the pleadings, evidence and arguments advanced by counsel for all parties, the circuit court concluded that Bourexis "has not met the burden for an Injunction" on "the elements that a Court must find before granting an injunction -- Interlocutory Injunction, likelihood of success, damages, balance of convenience, and public interest." Transcript of Proceedings on Motion for Interlocutory Injunction and Motion to Dismiss at M-113 (emphasis added),

reprinted herein as A. 4 to A. 5.[1] Thus, it is clear that the circuit court considered whether Bourexis had "met the burden" with respect to "damages." Ibid.

In his principal brief on appeal to the Court of Special Appeals, Bourexis argued that the denial of the injunction was improper because he had satisfied all of the requirements for its issuance, including the requirement of injury. Bourexis reiterated his position at oral argument. In rejecting Bourexis' claim, the Court of Special Appeals noted that he had not made any contention, "either in his complaint or in the evidence offered

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[1] At that hearing, Officer McKendrick argued in the alternative that if the court found that Bourexis suffered some injury, it was at most a monetary injury which can be redressed at law and therefore, that an injunction should not issue. Thus, contrary to petitioner's assertion, Petition for Writ of Certiorari at 19, respondents did not defend the motion for interlocutory injunction solely on the ground that petitioner suffered financial injury for which he should receive damages.

at the hearing," that he had suffered economic injury. Bourexis v. Carroll County Task Force, at A. 30 of Petition for Writ of Certiorari (emphasis added).

In light of the ample opportunities that Bourexis had -- and of which he took full advantage -- to demonstrate economic injury, the Court of Special Appeals' conclusion that Bourexis failed to show he had suffered or would suffer any economic harm was not a violation of Bourexis' due process rights.[2]

CONCLUSION

For all of the reasons discussed above, and for the reasons expressed in the brief in opposition to petition for

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[2] The cases cited by Bourexis, Ungar v. Handelsman, 325 Md. 135 (1992) and Phillips v. Venker, 316 Md. 212 (1989), are inapposite. In those cases, each court actually determined a matter against a party without first hearing from that party. Here, both the trial court and the intermediate appellate court heard from Bourexis extensively on the precise issue resolved against him.

writ of certiorari filed by respondents Carroll County Narcotics Task Force and Officer Robert Heuisler, the petition for certiorari should be denied.

Respectfully submitted,

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February 24, 1994

IN THE CIRCUIT COURT FOR CARROLL COUNTY

STEPHEN B. BOUREXIS *
Plaintiff

* Case No. C-
v. 92-13193 CV
*

CARROLL COUNTY NARCOTICS
TASK FORCE, et al. *
Defendants

* * * * * * * * *

MEMORANDUM IN OPPOSITION TO DEFENDANT McKENDRICK'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR INTERLOCUTORY INJUNCTION

Plaintiff submits the following Memorandum in Opposition to Defendant McKendrick's Motion to Dismiss or, In the Alternative, for Summary Judgment, and also in support of the Plaintiff's Motion for Interlocutory Injunction.

I. STATEMENT OF FACTS

* * *

II. ARGUMENT

* * *

3. Is the Plaintiff entitled to injunctive relief?

For the forgoing reasons, the Plaintiff has shown that he does have a substantial likelihood of succeeding on the merits of his claim, that there is absolutely no public interest to be served in allowing the Task Force to pursue its unlawful course of conduct, and that the Plaintiff has been, and is being, irreparably injured by this unlawful conduct.

It is well-settled that a Plaintiff's request for money damages does not bar injunctive relief. Rule BB76; Anne Arundel County v. Whitehall Venture, 39 Md.App. 197 (1978). The Defendant's conduct continues to irreparably harm the Defendant's reputation and his business which is, of course, the Defendant's intent. If the Defendant can show that he is able to put up a bond to indemnify the Plaintiff for his claimed damages, then

perhaps the Defendant might have a point worth arguing. However, the Defendant has made no such attempt. Otherwise, the Defendant's position is patently frivolous, given the enormity of the damage he is intentionally inflicting on the Plaintiff.

III. CONCLUSION

* * *

IN THE CIRCUIT COURT FOR CARROLL COUNTY

STEPHEN B. BOUREXIS Plaintiff	*	
	*	Case No. C-92-13193 CV
v.	*	
CARROLL COUNTY NARCOTICS TASK FORCE, et al. Defendants	*	

* * * * * * * * *

EXCERPT FROM THE REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS IN THE CASE OF STEPHEN P. BOUREXIS V. THE CARROLL COUNTY NARCOTICS TASK FORCE, ET AL., CASE NO. C-92-13193 CV, IN THE CIRCUIT COURT FOR CARROLL COUNTY, MARYLAND, Westminster, Maryland on Friday, September 18, 1992:

ON MOTION FOR INTERLOCUTORY INJUNCTION AND MOTION TO DISMISS (M-113):

* * *

THE COURT: All right. On the question, first, of the Injunction and the elements that a Court must find before granting an Injunction -- Interlocutory Injunction, likelihood of success, damages, balance of

convenience, and public interest, the Court finds that the Plaintiff has not met the burden for an Injunction, and will deny the request for the Injunction.

Based on the cause of action and governmental immunity and whether or not there is an underlying right, I want to read your Memorandums in the cases that you cited, so the Court will reserve on the ques -- on the Motion to Dismiss and/or Summary Judgment. Give you an answer within the next couple of weeks in writing.

Thank you.

* * *